No. 82-1795

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,
v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER CAPITAL CITIES CABLE, INC.

Of Counsel:

CLYDE A. MUCHMORE
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102

TIMOTHY B. DYK *
JOHN W. ZUCKER
MARIAN E. LINDBERG
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioner Capital Cities Cable, Inc.

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether a State, consistent with the protection of commercial speech under the First and Fourteenth Amendments, may adopt a sweeping ban on truthful, non-misleading advertising for a lawful product.

2. Whether a State, consistent with the First and Fourteenth Amendments, may prevent cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, non-misleading advertising for wine.

3. Whether a State's regulation of advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

PARTIES TO THE PROCEEDING BELOW

The following were parties to the proceeding (No. 82-1061) in the United States Court of Appeals for the Tenth Circuit: Cablecom-General, Inc. (now Capital Cities Cable, Inc.); Cox Cable of Oklahoma City, Inc.; Multimedia Cablevision, Inc.; and Sammons Communications, Inc., appellees; and Richard A. Crisp, Director, Oklahoma Alcoholic Beverage Control Board, appellant.*

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* Petitioner Capital Cities Cable, Inc., construes the terms "parent companies," "subsidiaries," and "affiliates" in Rule 28.1 of the Rules of this Court to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries" and "affiliates," a majority of whose shares are owned by a party. With the terms so defined, Capital Cities Cable, Inc., has a parent company, Capital Cities Communications, Inc., and no subsidiaries or affiliates.

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BRIEF FOR PETITIONER CAPITAL CITIES CABLE, INC.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 699 F.2d 490 (1983) and appears as Appendix A to the petition for writ of certiorari. The opinion of the United States District Court for the Western District of Oklahoma granting a preliminary injunction is not reported and appears as Appendix D to the petition. The district court's opinion on summary judgment is also not reported and appears as Appendix G to the petition.[1]

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[1] References to the appendices to the petition for writ of certiorari will be in the form "Pet. App." References to the Joint Appendix will be in the form "J.A."

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983. On March 21, 1983, the court of appeals denied a petition for rehearing filed by petitioners. Pet. App. B. The petition for certiorari was filed on May 3, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the First, Fourteenth, and Twenty-first Amendments to the Constitution of the United States; Article 27, Section 5 of the Constitution of the State of Oklahoma; Section 516 of the Oklahoma Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516; Section 111(c)(3) of the Copyright Act of 1976, 17 U.S.C. § 111(c)(3); and Section 76.55(b) of the rules of the Federal Communications Commission, 47 C.F.R. § 76.55(b). These provisions are set forth in Pet. App. H. In addition, the case involves the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and Sections 76.57-.61 of the rules of the Federal Communications Commission, 47 C.F.R. §§ 76.57-61. These provisions are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioners operate cable television systems in Oklahoma. Petitioners' cable service consists largely of signals originated outside Oklahoma by television stations and national cable programming services. Petitioners receive these signals by antenna, microwave receiver or satellite dish and simultaneously retransmit them by wire to their subscribers. J.A. 23, 30, 36. In this way, petitioners are able to offer their subscribers a diverse mix of news and entertainment programming from across the country.

Petitioners are required by the "must carry" rules of the Federal Communications Commission ("the Commission") to transmit the signals of certain nearby television stations. 47 C.F.R. §§ 76.57-.61 (1982). In some cases, the "must carry" rules oblige petitioners to carry signals broadcast by stations outside Oklahoma. J.A. 22, 35. Most of petitioners' out-of-state programming, however, is selected by the cable operators, and it is this programming which typically furnishes the systems' primary appeal to subscribers. J.A. 22, 37. Out-of-state programming voluntarily carried by petitioners includes the signals of commercial television stations located in neighboring Kansas, Missouri, and Texas and the signals of so-called "superstations" such as WTBS in Atlanta and WGN in Chicago.[2] J.A. 21, 35. This programming contains occasional commercials for brands of wine. J.A. 21, 25. The commercials are lawful under federal law and in the states where they originate. Pet. App. G at 41a. Petitioners also provide advertiser-supported national cable programming services—such as the Cable News Network ("CNN"), the Entertainment and Sports Programing Network ("ESPN"), and the USA Network—which also typically include wine commercials.[3]

The sale and consumption of alcoholic beverages are lawful in Oklahoma. 699 F.2d at 500, Pet. App. A at 19a-20a; Pet. App. G at 42a. The state constitution, however, makes it unlawful "for any person, firm or

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[2] A "superstation" is an independent television station whose signal is relayed via satellite to cable systems beyond the normal reach of its over-the-air signal.

[3] *See* Brief Amicus Curiae of Turner Broadcasting System, Inc. ("Turner Brief") at 3-4. Although the limited record in this case does not include details as to petitioners' carriage of these programming services, there is no dispute that they do carry them. *See* BROADCASTING/CABLECASTING YEARBOOK 1983 at D164-71. In addition, petitioners offer subscribers certain so-called "pay" services, such as Home Box Office (HBO), that at present contain no advertising.

corporation to advertise the sale of alcoholic beverages within the State of Oklahoma, except one sign at the retail outlet bearing the words 'Retail Alcoholic Liquor Store.'" Okla. Const. Art. 27, § 5. An Oklahoma statute makes it unlawful "to advertise any alcoholic beverages or the sale of same within the State" and specifically defines wine as an alcoholic beverage within the scope of the advertising ban. Okla. Stat. Ann. tit. 37, §§ 516, 506(3). The advertising of beer has been permitted. 699 F.2d at 492, 502, Pet. App. A at 3a-4a, 23a.[4]

The ban on advertising of alcoholic beverages has for some years been interpreted by the State to forbid Oklahoma television stations from broadcasting wine commercials contained in national network programming, as well as from locally originating such commercials.[5] At the same time, the Oklahoma Attorney General has construed the ban not to apply to alcoholic beverage advertisements appearing in newspapers, magazines and other publications printed outside Oklahoma, including publications specifically designed for circulation within the State.[6] Out-of-state publications may be delivered to Oklahoma subscribers and sold at outlets within the State even though they contain advertising for wine or other alcoholic beverages. 699 F.2d at 493 n.1, 502, Pet. App. A at 5a n.1, 23a-24a.

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[4] The State's definition of alcoholic beverages includes beer containing more than 3.2 percent alcohol by weight. Okla. Stat. Ann. tit. 37, § 506(3). However, because beer advertising does not usually specify alcoholic content, and some beer contains no more than 3.2 percent alcohol, the advertising of beer generally has been allowed. 699 F.2d at 492, Pet. App. A at 3a-4a.

[5] In upholding this application of the ban, the Oklahoma Supreme Court emphasized that television stations are able to delete wine commercials from network programming. *See Oklahoma Alcoholic Beverage Control Board v. Heublein Wines International*, 566 P.2d 1158, 1160, 1162 (Okla. 1977).

[6] *See, e.g.*, Op. Okla. Att'y Gen. No. 76-348 (Nov. 24, 1976).

Until recently, the State applied a similar policy to cable operators, and they were permitted to carry out-of-state programming containing wine commercials. 699 F.2d at 492, Pet. App. A at 4a; Pet. App. G at 41a. In March 1980, however, the Oklahoma Attorney General issued an opinion stating that retransmission of out-of-state wine commercials by cable systems operating in Oklahoma would be deemed a violation of state law. Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980). Respondent Crisp, director of the Oklahoma Alcoholic Beverage Control Board, notified Oklahoma cable operators, including petitioners, that they faced imminent criminal prosecution if they continued to carry out-of-state wine commercials. 699 F.2d at 492, Pet. App. A at 4a; Pet. App. G at 41a.

Cable television operators are prohibited by federal law from altering or modifying the content of the television signals, including commercials, that they deliver to their subscribers. 699 F.2d at 492, Pet. App. A at 4a; Pet. App. G at 40a. Section 76.55(b) of the Federal Communications Commission's rules, 47 C.F.R. § 76.55(b) (1982), requires that television programming retransmitted by a cable system "shall be carried in full, without deletion or alteration of any portion." The section has been specifically held to forbid the deletion of commercial messages.[7] In addition, the Copyright Act of 1976 expressly prohibits cable systems operating under the statutory compulsory licensing system from willfully deleting a commercial advertisement from a television signal. 17 U.S.C. §§ 111(b)(3), 111(c)(3) (1982).[8]

Even if deletion of out-of-state wine commercials were lawful, there would be, as the district court found, "no

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[7] *See e.g., Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978).

[8] The Act contains an exception, not applicable here, for deletion of commercial advertising "by those engaged in television commercial advertising market research." 17 U.S.C. § 111(c)(3) (1982).

feasible way for [petitioners] to block out the advertisements." Pet. App. G at 41a. Petitioners have no control over the programming or advertising included in out-of-state television signals and receive no advance notice from the stations concerning the scheduling of wine commercials. Pet. App. G at 40a; J.A. 24-26, 36-38. Petitioners' reception and retransmission of the television signals occur simultaneously, and, as a practical matter, petitioners would thus be unable to delete each wine commercial in its entirety as it appears. J.A. 25, 30. Even to attempt to delete the major part of each wine commercial would require an extremely burdensome and costly effort to monitor each signal continuously. Pet. App. D at 29a; J.A. 25-26, 30, 36-38.

Although Federal Communications Commission rules do not forbid the deletion of wine commercials from advertiser-supported, satellite-carried programming services such as CNN, deletion of such commercials would violate the terms of the operator's contract with the programmer and would violate the Copyright Act.[9] Moreover, cable operators typically receive no notice from the programming services as to when wine commercials will appear, so deletion of the commercials is technically and economically impracticable for the same reasons as is deletion of the commercials from out-of-state television signals.[10]

For these reasons, if petitioners were forbidden from retransmitting out-of-state wine commercials, they would be compelled to discontinue their carriage of all signals from television stations and national programming services that might contain such commercials. This would deprive Oklahoma residents of access to the programming offered by the Atlanta, Chicago and other "supersta-

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[9] *See* Turner Brief at 6. *See also* 17 U.S.C. §§ 106(2), 111(b) (1982).

[10] *See* Turner Brief at 7.

tions," as well as that provided by other, less distant stations whose signals are available to Oklahoma residents only by means of cable retransmission. Cable operators would also be unable to carry CNN and other advertiser-supported satellite programming services.

Failure to carry out-of-state signals would also place some cable operators in violation of the Commission's "must carry" rules. 47 C.F.R. §§ 76.57-.61 (1982). J.A. 21-22, 34-36. And by precluding the carriage of out-of-state broadcast signals and other advertiser-supported programming, the Oklahoma ban would prevent cable operators from offering much of their most popular programming. J.A. 21-22, 37. As the district court found, this would cause the operators a substantial loss in subscriber revenue, Pet. App. G at 42a, and threaten their economic viability. J.A. 22.

District Court Proceedings

After being warned of possible prosecution if they continued to carry out-of-state wine commercials, petitioners brought an action on March 3, 1981, in the United States District Court for the Western District of Oklahoma against respondent Crisp. J.A. 1. Petitioners sought declaratory and injunctive relief, alleging that the advertising ban as applied to them violated the First and Fourteenth Amendments and was preempted by federal law and actions of the Federal Communications Commission.[11]

Following an evidentiary hearing, the district court on March 6, 1981, granted a preliminary injunction. Pet. App. D. On December 18, 1981, the court entered summary judgment for petitioners and issued a permanent

[11] Petitioners also alleged that enforcement of the advertising ban against them would violate the Commerce Clause and the Equal Protection Clause. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331, 1343, and 2201 (1976 & Supp. V 1981) and 42 U.S.C. § 1983 (1976).

injunction. Pet. App. E, F.[12] A supporting opinion was filed on February 10, 1982. Pet. App. G.

The district court found that the wine commercials carried by petitioners were not false or misleading and did not advocate unlawful activity, Pet. App. G at 47a, and held that they therefore were entitled to First Amendment protection. *Id.* The court ruled that Oklahoma's "blanket suppression," *id.* at 49a, of this advertising violated the First Amendment, relying on decisions of this Court for the proposition that "the State cannot totally prohibit the dissemination of truthful information about a lawful activity." Pet. App. G at 46a.

The court held that the ban failed to satisfy the requirements of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), because it had been shown to serve only remotely and ineffectively, if at all, the state's asserted interest in curtailing alcohol abuse and alcoholism. *Id.* at 48a.[13] The court also concluded that the ban was invalid under *Central Hudson* because there existed alternative measures, such as labeling requirements, educational programs, or prohibition of the sale or consumption of alcohol, that could combat alcohol abuse more directly and effectively without impinging on First Amendment interests. *Id.* at 42a, 48a-49a.

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[12] On the same date, the district court awarded summary judgment and injunctive relief to a group of Oklahoma broadcast television stations that had brought a separate lawsuit challenging on First Amendment grounds the State's proscription of their broadcasting of wine commercials contained in national network programming. *Oklahoma Telecasters Association v. Crisp*, No. Civ-81-439-W (W.D. Okla. Dec. 18, 1981), *rev'd*, 699 F.2d 490 (10th Cir. 1983).

[13] The court pointed out that enforcement of the ban against petitioners would merely prohibit them "from disseminating advertisements of something the public already knows from experience and from reading [out-of-state] newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices." Pet. App. G at 45a.

The court rejected the contention that Oklahoma's power to regulate alcoholic beverages under the Twenty-first Amendment superseded or relaxed the requirements of the First Amendment. *Id.* at 45a-46a.

In addition, the court found that enforcement of the Oklahoma ban against petitioners would effectively preclude them from carrying any out-of-state television signals that might contain wine commercials, because they are prevented by federal law from deleting the commercials, *id.* at 38a, and because "there exists no feasible way for [them] to block out the advertisements." *Id.* at 41a.[14]

The Decision Below

On appeal, the Tenth Circuit reversed, holding that enforcement of the Oklahoma ban against petitioners did not violate the First Amendment.[15]

The court of appeals agreed that the advertising at issue concerned lawful activity, was not false or misleading, and therefore was "protected speech under the First Amendment." 699 F.2d at 500, Pet. App. A at 20a. The court also acknowledged the absence of any record evidence linking the advertising of alcoholic beverages—particularly wine—to the State's asserted interest in curtailing alcohol abuse or suggesting that the elimination of these commercials would effectively reduce alcohol abuse. 699 F.2d at 501, Pet. App. A at 22a. Nevertheless, the court upheld the ban as being "reasonably related" to the State's interest, based on the con-

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[14] The district court did not reach petitioners' other constitutional claims. Pet. App. G at 39a-40a.

[15] Petitioners' other constitutional claims were not addressed by the court of appeals. 699 F.2d at 493 n.1, Pet. App. A at 5a. At the same time, and in the same opinion, the court also reversed the district court's judgment for the broadcast plaintiffs in *Oklahoma Telecasters Association v. Crisp*, No. 82-1058. The broadcast plaintiffs did not petition for certiorari.

clusion that advertising necessarily encourages consumption. 699 F.2d at 501, Pet. App. A at 22a. The court also found that the ban was "no more extensive than was necessary to serve Oklahoma's asserted interest." 699 F.2d at 502, Pet. App. A at 24a. The court did not discuss the various less restrictive alternatives proposed by the district court and by petitioners.

The court purported to base its decision on the four-part test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). However, the court held that the *Central Hudson* test should be applied more leniently in this case because of "the additional deference owed to the legislature as a result of the Twenty-first Amendment." 699 F.2d at 501, Pet. App. A at 22a. The court also concluded that its decision was "mandate[d]," 699 F.2d at 502, Pet. App. A at 24a, by this Court's summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), which left undisturbed a decision by the Ohio Supreme Court upholding that state's restrictions on off-premises price advertising by liquor licensees.

The Tenth Circuit noted that cable operators were precluded by federal law from deleting wine commercials from the television signals they carry, 699 F.2d at 492, Pet. App. A at 4a, and that they "especially are placed in a difficult position" by the Oklahoma ban. 699 F.2d at 502, Pet. App. A at 23a. The court did not, however, address the First Amendment implications of the ban's effective prohibition of the carriage of out-of-state advertiser-supported programming. Nor did the court indicate how cable programming could be distinguished from magazines and newspapers, which may be distributed in Oklahoma even though they contain alcoholic beverage advertising.

On March 21, 1983, the Tenth Circuit denied a petition for rehearing and refused petitioners' request that

it clarify its ruling to preserve for later adjudication petitioners' preemption claims and other constitutional issues not addressed in the court's opinion. Pet. App. B. The court stayed its mandate on April 4, 1983. Pet. App. C.

A writ of certiorari was granted by this Court on October 3, 1983. J.A. 43. In addition to the First Amendment issues raised by petitioners, this Court directed the parties to address the question whether the Oklahoma ban, as applied to cable operators' carriage of out-of-state signals, had been preempted by existing federal regulation.

SUMMARY OF ARGUMENT

Oklahoma's ban on the advertising of alcoholic beverages is an unconstitutional infringement of protected commercial speech. This Court has made clear that such a blanket, content-based ban on truthful advertising about a lawful product violates the First Amendment. In addition, the ban cannot survive the test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), because the State has not demonstrated a direct and substantial link between alcoholic beverage advertising—in particular, wine commercials—and its asserted interest in curtailing alcoholism and alcohol abuse. The State has also failed to show that it could not promote its interest in alternative ways less destructive of First Amendment rights. Contrary to the holding by the court below, the Twenty-first Amendment does not ease the First Amendment standards applicable here.

Beyond its impact on commercial speech, the Oklahoma ban is also invalid under the First Amendment because it substantially limits noncommercial speech in the form of news and entertainment programming that cable operators transmit to their subscribers. Cable operators are legally and technically unable to delete wine commercials that appear in the television signals and advertiser-supported cable programming services they carry. By

forbidding cable operators from transmitting wine commercials, the Oklahoma ban effectively prevents them from carrying any advertiser-supported out-of-state programming that might include such commercials. The ban thus restricts impermissibly the editorial choices of cable operators and the interstate flow of information and ideas.

The Oklahoma ban is also preempted by federal law and policies. First, it conflicts with federal regulations that require cable operators to carry certain out-of-state television signals without deletion or alteration. Second, it intrudes into an area—cable signal carriage—specifically preempted by the Federal Communications Commission. Finally, it conflicts with important federal policies reflected in the Communications Act and Copyright Act and frustrates the congressional and agency desire to promote cable carriage of distant television signals and national cable programming services.

ARGUMENT

I. OKLAHOMA'S BLANKET BAN ON TRUTHFUL ADVERTISING OF A LAWFUL PRODUCT VIOLATES THE FIRST AMENDMENT.

In a series of decisions over the past decade, this Court has made clear that truthful commercial speech about a lawful product or activity is protected by the First Amendment and has repeatedly invalidated government efforts to suppress such speech. Oklahoma's blanket ban on the truthful advertising of lawful alcoholic beverages, for the express purpose of diminishing public knowledge about the products, violates the First Amendment. The Twenty-first Amendment does not justify or support this abridgment of protected commercial speech.

A. The First Amendment Forbids States From Enacting Blanket, Content-Based Bans on Truthful Advertising of a Lawful Product.

Decisions of this Court at one time suggested that commercial speech was outside the scope of the First Amend-

ment.[16] Beginning with *Bigelow v. Virginia*, 421 U.S. 809 (1975), however, the Court has established that commercial speech—including product advertising—promotes important First Amendment values and is entitled to substantial constitutional protection.

By informing consumers of the availability, nature, and price of products, commercial speech fulfills an "indispensable" role in the allocation of resources and in the structuring and functioning of our economy. *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).[17] This Court has accordingly rejected the "highly paternalistic" view that government may attempt to shield citizens from perceived problems connected with legally available products and services by forbidding truthful, non-misleading advertising about them. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Rather, it has held that the First Amendment compels government

> to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. The Court has upheld prohibitions of advertising that is false or misleading or that promotes an unlawful product[18] and has indicated that certain narrow restric-

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[16] *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1942).

[17] *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976).

[18] *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).

tions—such as content-neutral time, place and manner regulations—may be constitutional as to commercial speech when they would be invalid as to noncommercial speech.[19] However, since it recognized that the First Amendment protects commercial speech, the Court "has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 n.9 (1980).

Thus, the Court held in *Carey v. Population Services International*, 431 U.S. 678 (1977), that a state could not prohibit the advertising of contraceptives, despite the state's assertions that the restriction was necessary to protect the public from potentially offensive materials and to discourage unlawful sexual activity. The Court declared that "a State may not 'completely suppress the dissemination of concededly truthful information'" about a lawful product.[20] The Court has similarly invalidated state bans on advertising by lawyers, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); on the advertising of abortion services, *Bigelow v. Virginia*, 421 U.S. 809 (1975), and on price advertising by pharmacists. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

It has been suggested that this Court in *Central Hudson* somehow relaxed its earlier strict stance concerning content-based blanket bans on protected commercial speech.[21] It is true that *Central Hudson* set up a four-

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[19] *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 503-12 (1981); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 564-66; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771.

[20] 431 U.S. at 700 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 773).

[21] *See Central Hudson*, 447 U.S. at 573-79 (Blackmun, J., concurring).

part test, discussed in the following section, for analyzing commercial speech restrictions. However, the Court did not purport in *Central Hudson* to alter its position on blanket bans. To the contrary, the Court endorsed the reasoning of prior decisions [22] and specifically noted its continuing resistance to such blanket bans.[23] The Court's subsequent opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981), expressly reaffirmed that:

> A State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its disseminators and its recipients.

Oklahoma's ban on the advertising of alcoholic beverages is precisely the sort of blanket ban on commercial speech repeatedly condemned by this Court.

As both courts below found, the wine commercials at issue here are truthful and not misleading. 699 F.2d at 499 n.7, 500, Pet. App. A at 18a n.7, 20a; Pet. App. G at 47a. The Oklahoma ban is neither limited to nor directed at speech which is false or misleading, but instead sweeps broadly to encompass all alcoholic beverage advertising. 699 F.2d at 500 n.8, Pet. App. A at 20a n.8; Pet. App. G at 47a. It is also clear that the ban does not involve a product or activity that is unlawful in Oklahoma; the State permits the sale and consumption of alcoholic beverages. 699 F.2d at 500, Pet. App. A at 19a-20a; Pet. App. G at 42a. The commercials do not depict or propose illegal conduct and cannot "even remotely be characterized as 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'" *Carey v. Population Services International*, 431 U.S. at 701 (quoting *Brandenburg v. Ohio*, 395 U.S.

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[22] *Id.* at 566. *See also In re R.M.J.*, 455 U.S. 191 (1982).

[23] 447 U.S. at 566 n.9.

444, 447 (1969)).[24] The possibility that individuals might use alcoholic products unlawfully does not justify a sweeping ban on alcoholic beverage advertising, just as the potential misuse of prescription drugs did not justify the advertising restrictions struck down in *Virginia State Board of Pharmacy*, 425 U.S. at 766-68.[25]

As the district court found, the ban is plainly a content-based "blanket suppression" of advertising about wine and other alcoholic beverages. Pet. App. G at 49a. While the Tenth Circuit asserted that the ban does not entirely eliminate the dissemination of information about these products because "[o]n-premises advertising is allowed," 699 F.2d at 502, Pet. App. A at 23a, this view limited exception hardly prevents the restrictions from being the kind of blanket ban condemned by this Court's decisions. The on-premises advertising permitted by Oklahoma consists of a single sign at the retail outlet identifying it as a "Retail Alcoholic Liquor Store" in letters no more than four inches high. 37 Okla. Stat. Ann. § 516. The exception thus plainly does not allow any actual advertising at all, but only a limited on-premises identification of retail outlets. As the Court said in *Virginia State Board of Pharmacy* about a similarly narrow exception to a ban on drug price advertising, "[i]t is clear, nonetheless, that all advertising . . ., in the normal sense, is forbidden." 425 U.S. at 752.[26]

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[24] *Compare Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 489 (1982) (sustaining ordinance "expressly directed at commercial activity promoting or encouraging illegal drug use").

[25] *See also Carey v. Population Services International*, 431 U.S. at 701 (possibility that contraceptive advertisements might encourage some to engage in unlawful sexual activity does not justify complete ban on advertising of the product).

[26] The restrictions at issue in *Virginia State Board of Pharmacy* permitted pharmacists to quote prescription drug prices over the telephone. 425 U.S. at 752. Another exception to the Oklahoma ban relied on here by the Tenth Circuit was the State's decision not

Oklahoma's attempt to enforce the ban against cable operators raises particularly important constitutional concerns, since, as this Court held in *Bigelow v. Virginia*, 421 U.S. at 828, a ban on advertising "incur[s] more serious First Amendment overtones" when, as here, it is enforced against the press. In that case, Virginia sought to enforce a ban on the advertising of abortion services against a Virginia newspaper editor who had published an advertisement placed by a New York abortion service. The Court reversed the editor's conviction, holding that the state's "interest in shielding its citizens from information about activities outside [its] borders . . ., even if understandable, was entitled to little, if any, weight." *Id.* at 827-28.

Here, the state of Oklahoma similarly attempts to shield its citizens from commercial speech originating outside the State by acting against the press. Such a sweeping attempt to enforce "protection . . . based on ignorance" cannot be squared with the First Amendment.[27]

B. The State Ban on Alcoholic Beverage Advertising Violates the *Central Hudson* Test.

We have demonstrated above that Oklahoma's blanket ban is so plainly invalid under decisions of this Court that it is unnecessary to subject it to specific scrutiny under the four-part *Central Hudson* test. If considered un-

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to prohibit the sale or distribution within Oklahoma of out-of-state publications containing alcoholic beverage advertising. 699 F.2d at 502, Pet. App. A at 23a. This does not, however, make the restrictions any less of a "blanket ban"—or any more constitutional—under the decisions of this Court. In none of the cases in which this Court has struck down a state restriction on commercial speech as a "total" or "blanket" ban did the State apparently attempt to forbid the distribution of out-of-state publications. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. at 383; *Carey v. Population Services International*, 431 U.S. at 702; *Virginia State Board of Pharmacy*, 425 U.S. at 771.

[27] *Id.* at 769.

der that test, however, the ban still must fail. The test was described in *Central Hudson* as follows:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[28]

The commercial speech at issue here is clearly protected under the first part of the *Central Hudson* test since it concerns lawful activity and is not false or misleading. As for the second part of the test, the interest asserted by the State in support of its advertising ban is the curtailment of alcoholism and alcohol abuse.[29] Petitioner does not dispute that this is a substantial and important interest.[30] But *Central Hudson* and other decisions of this Court have made clear that invocation of a substantial state interest does not in itself justify an infringement of protected commercial speech.[31] The State

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[28] 447 U.S. at 566. *See also Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2881 (1983); *In re R.M.J.*, 102 S. Ct. at 937.

[29] 699 F.2d at 498, Pet. App. A at 20a.

[30] While petitioner agrees that the State has a substantial interest in limiting alcoholism and alcohol abuse, it does not agree that the State has a substantial interest in curtailing advertising about wine or other alcoholic beverages. *See* discussion below. Any interest that the State may have in prohibiting alcoholic beverage advertising is substantially diminished by the exceptions it has created for out-of-state print publications and for beer advertising. As this Court observed in *Metromedia, Inc. v. San Diego*, 453 U.S. at 520-21, "exceptions to the general prohibition are of great significance in assessing the strength of the [government's] interest."

[31] *See, e.g., Central Hudson*, 447 U.S. at 571 (ban on promotional advertising by electric utilities struck down despite "imperative"

must still satisfy the third and fourth parts of the *Central Hudson* test, something Oklahoma has not done.

The third part of the *Central Hudson* test requires that the State demonstrate a direct and substantial link between its asserted interest and the restriction on commercial speech. As conceded by the Tenth Circuit, the record here contains no evidence that the advertising of wine or other alcoholic beverages contributes to alcohol abuse or that the suppression of such advertising would significantly reduce alcohol abuse. 699 F.2d at 501, Pet. App. A at 22a. On the record before it, the district court specifically found the advertising ban served the State's interest only remotely and ineffectively, if at all. Pet. App. G at 48a.

Despite the lack of record evidence, the Tenth Circuit upheld the ban on the ground that it was not "unreasonable" for Oklahoma to "believe" that advertising of alcoholic beverages necessarily increased their consumption. 699 F.2d at 501, Pet. App. A at 22a.[32] The court supported this finding by asserting that "[t]he entire economy of the industries that bring these challenges is based on the belief that advertising increases sales." 699 F.2d

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national interest in energy conservation); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85, 94 (1977) ("vital goal" of racial integration does not justify ban on "For Sale" signs); *Virginia State Board of Pharmacy*, 425 U.S. at 766 (ban on pharmacists' price advertising invalidated despite "strong interest" in maintaining standards of profession). *See also Bates v. State Bar of Arizona*, 433 U.S. at 368-79.

[32] The Tenth Circuit relied on this Court's decision in *Metromedia* for the proposition that the nexus between the regulation and the asserted state interest need only meet the deferential scrutiny of a "rational relationship" test. 699 F.2d at 501. This reliance was misplaced. The restriction on commercial speech at issue in *Metromedia* was content-neutral and limited a single medium of speech (billboards) in order to pursue purposes not related to speech. In contrast, the restrictions in question here are directed at speech of a particular content and seek to suppress that speech in all Oklahoma media because of the effect the information might have on the public.

at 501, Pet. App. A at 22a. However, the fact that manufacturers and distributors of alcoholic beverages advertise does not in itself demonstrate that such advertising increases overall consumption. It may be logical to assume, as this Court did in *Central Hudson*, that advertising in a monopoly situation necessarily is designed to increase overall consumption. 447 U.S. at 569. But significant competition exists among various brands and varieties of alcoholic beverages, and there is substantial evidence that alcoholic beverage advertising serves principally to influence market shares.[33] There is no evidence here that eliminating advertising significantly reduces consumption; indeed, the district court noted that the consumption of alcoholic beverages in Oklahoma had increased substantially since enactment of the ban. Pet. App. G at 42a.

Even if the advertising of wine did serve to increase wine consumption, this would not necessarily show that it increased the incidence of alcoholism or alcohol abuse. Recent studies have concluded that "no scientific evidence exists that beverage alcohol advertising has any significant impact on the rate of alcohol abuse and alcoholism in America society."[34] To the extent the wine commer-

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[33] The founding director of the National Institute on Alcohol Abuse and Alcoholism has stated that advertising "does not, for the most part, cause people to engage in drinking alcoholic beverages . . . But advertising can be effective in causing those who are already drinking to switch brands. . . . A ban on alcohol advertising may in fact further add to the 'forbidden fruit' aspect of alcohol (particularly among the young) . . ." M. Chafetz, *Ban on liquor ads is no cure for alcoholism*, ADVERTISING AGE, July 7, 1975, at 15. *See also* H. LEVENTHAL, *An Analysis of the Influence of Alcoholic Beverage Advertising on Drinking Customs*, in ALCOHOL EDUCATION FOR CLASSROOM AND COMMUNITY (R. McCarthy ed. 1964); R. Smart and R. E. Cutler, *The Alcohol Advertising Ban in British Columbia: Problems and Effects on Beverage Consumption*, 71 BRIT. J. OF ADDICTION 13 (March 1976).

[34] D. PITTMAN, PRIMARY PREVENTION OF ALCOHOL ABUSE AND ALCOHOLISM: AN EVALUATION OF THE CONTROL OF CONSUMPTION

cials present an alternative to hard liquor and spirits, they may indeed encourage moderation in the consumption of alcohol.[35]

There is substantial doubt whether a ban on out-of-state advertising on cable television would effectively diminish the consumption of alcohol in any event. As the district court below found, the ban cannot effectively insulate Oklahoma's citizens from information about the availability and variety of alcoholic beverages, since such information is widely known and continues to enter Oklahoma in ways the state has not regulated.[36]

Restrictions on commercial speech with such a "speculative" and "tenuous" relationship to the State's asserted interest cannot be reconciled with the First Amendment.[37] In *Linmark Associates, Inc. v. Township of Willingboro*, for example, the Court acknowledged that it was "plausi-

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POLICY 18 (Social Science Institute of Washington University 1980). *See also* R. WILKINSON, THE PREVENTION OF DRINKING PROBLEMS 43-48, 132, 157 (1970).

[35] *See* C. Burck, *Changing Habits in American Drinking*, FORTUNE, Oct. 1976, at 156, 159-60. Current medical evidence suggests that moderate consumption of alcoholic beverages, particularly of wine, may provide important health benefits. *See, e.g.*, Washington Post, Nov. 12, 1981, at E22, Col. 1 ("Doctors have concluded from a 10-year study that persons who consume two or fewer drinks of wine or other alcoholic beverages daily appear to live longer than persons who abstain from drinking entirely"). *See also* Washington Post, June 6, 1982, Mag., at 27; N.Y. Times, Aug. 4, 1981, at A13, col. 1; U.S. NEWS & WORLD REP., Mar. 30, 1981, at 74; NEWSWEEK, Aug. 17, 1981, at 77.

[36] Pet. App. G at 45a, 48a. As noted by the court, liquor advertisements enter Oklahoma in newspapers and periodicals originating outside the state, and wine commercials on certain out-of-state radio and television broadcasts may be received by Oklahoma citizens over the air.

[37] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 569.

ble" that the community's ban on "For Sale" signs would reduce panic selling by whites and promote the community's interest in racially integrated housing, 431 U.S. at 96 n.10, but refused to find a sufficiently direct nexus between the ban and the State's interest because no causal relationship had been demonstrated in the record and because there were other, equally plausible interpretations of the ban's effect and of the reasons for whites' departure. *Id.* at 95-96. Similarly, in *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2884 (1983), the Court invalidated a federal ban on the mailing of contraceptive advertisements because only a "marginal" and "incremental" relationship had been shown between the ban and the state's asserted interest in promoting parents' control over reading materials.[38]

The Oklahoma ban also fails to satisfy the fourth part of the *Central Hudson* test, which requires the State to establish that the suppression of speech "is no more extensive than necessary to further the State's interest." 447 U.S. at 569-70. As in *Central Hudson*, no showing has been made that "a more limited restriction . . . would not serve adequately the State's interests." *Id.* at 570. The alternatives available to the State here are numerous. Here, unlike *Central Hudson*, where prohibition of the activity in question—the consumption of energy—was obviously infeasible, Oklahoma could attempt to solve problems perceived to result from the consumption of alcohol by banning the sale and consumption of alcoholic beverages in the State, as it has done in the past. Pet. App. G at 42a. This alternative, which does not affect speech at all, is constitutionally preferable to a ban on speech. *See Virginia State Board of Pharmacy*, 425 U.S. at 770.

Short of this, the State still has available to it many alternatives. It can strictly regulate the times, places,

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[38] *See also Bates v. State Bar of Arizona*, 433 U.S. at 375-79; *Virginia State Board of Pharmacy*, 425 U.S. at 766-70.

and circumstances in which alcoholic beverages may be dispensed. If it demonstrates that particular advertising encourages excessive consumption of alcoholic beverages, it can prohibit that advertising, as the Court suggested in *Central Hudson*. 447 U.S. at 570. The district court noted other possible alternatives, including labeling requirements and educational programs designed to inform citizens of the dangers of alcohol abuse. Pet App. G at 48a-49a. As observed by the district court, such measures would combat alcohol-related problems more directly than an advertising ban and in a manner far more compatible with First Amendment principles—by increasing information available to the public, rather than diminishing it.[39]

C. The Twenty-first Amendment Does Not Justify the State's Advertising Ban.

The Tenth Circuit rested its decision below largely on its erroneous conclusion that the Oklahoma ban was entitled to "additional deference . . . as a result of the Twenty-first Amendment." 699 F.2d at 501, Pet. App. A at 22a.

In interpreting the Twenty-first Amendment, this Court has focused on the Amendment's express language and history.[40] The Amendment, adopted in 1933, has two substantive sections. Section 1 repealed the Eighteenth Amendment. Section 2 granted power to the states to control the shipment of alcoholic beverages into their territory:

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[39] Pet. App. G at 49a. *See In re R.M.J.*, 102 S. Ct. at 939; *Linmark Associates v. Township of Willingboro*, 431 U.S. at 97; *Virginia State Board of Pharmacy*, 425 U.S. at 769-70. *Cf. Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence").

[40] *See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980); *Craig v. Boren*, 429 U.S. 190, 205-06 (1976).

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

The history of the Amendment shows that Section 2 was designed to elevate to constitutional status the Webb-Kenyon Act, which had been enacted before passage of the Eighteenth Amendment and which allowed states to prohibit or regulate the importation of alcoholic beverages.[41] Although the Webb-Kenyon Act had been upheld by a divided Supreme Court before national prohibition,[42] doubts remained whether the Court might on reconsideration hold that the law imposed an impermissible burden on interstate commerce, in violation of the Commerce Clause.[43] Representatives of the "dry" states also worried that Congress might at some later date modify or repeal the Act.[44] Section 2 was therefore designed "to assure the so-called dry States against the importation of intoxicating liquor into those States . . . [by] writ[ing] permanently into the Constitution a prohibition along that line . . ."[45]

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[41] Act of Mar. 1, 1913, Ch. 90, 37 Stat. 699, 27 U.S.C. § 122 (1976), *reenacted*, Ch. 740, § 202(b), 49 Stat. 877 (1935).

[42] *Clark Distilling Co. v. Western Maryland Railway*, 242 U.S. 311 (1917).

[43] Thus, Senator Borah observed that without passage of Section 2 Congress would be "turning the dry states over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it." 76 CONG. REC. 4170, 4172 (1933). *See also id.* at 4141 (remarks of Sen. Blaine).

[44] *Id.* at 4170 (remarks of Sen. Borah).

[45] 76 CONG. REC. 4141 (1933) (remarks of Sen. Blaine, reporting the views of the Senate Judiciary Committee). *See also id.* at 4228 (remarks of Sen. Bingham); *id.* at 4171 (remarks of Sen. Wagner); *id.* at 4172 (remarks of Sen. Lewis).

The Twenty-first Amendment was thus "intended to free the State of 'traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'" *United States v. State Tax Commission*, 412 U.S. 363, 375 (1973).[46] The Amendment has accordingly been held to give states wide latitude to regulate the transportation and distribution of alcoholic beverages in ways that would otherwise violate the Commerce Clause.[47] Included in this is the power to prohibit the consumption or manufacture of alcoholic beverages within the state.[48] Even in the Commerce Clause context, however, the Court has rejected the notion "'that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned.'"[49]

When state regulations on alcoholic beverages conflict with constitutional provisions other than the Commerce Clause, the Amendment has generally been held to have little or no significance. As the Court observed in *Craig v. Boren*, 429 U.S. 190, 206 (1976):

> [T]he Amendment primarily created an exception to the normal operation of the Commerce Clause . . . Once passing beyond the consideration of the Commerce Clause, the relevance of the Twenty-first Amendment becomes increasingly doubtful.

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[46] Quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964).

[47] *See, e.g., Joseph F. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (upholding retaliatory prohibition of liquor imports from certain states); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding import fees).

[48] *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939).

[49] *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. at 109 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 331-32).

For example, in *Department of Revenues v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964), the Court held that the Twenty-first Amendment does not permit a state to tax imported liquor in violation of the Constitution's Export-Import Clause.[50] The significance of the Twenty-first Amendment is particularly circumscribed when individual civil rights are at stake, since "'[n]either the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'" *Craig v. Boren*, 429 U.S. at 206.[51]

Thus, in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court held that a state could not authorize the posting of notes in liquor stores identifying certain persons as alcoholics or public hazards without providing due process. The Twenty-first Amendment, the Court held, neither justified the "posting" statute nor relaxed normal due process requirements. Similarly, in *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505 (1982), the Court struck down a state law that gave religious organizations the power to veto liquor license applications for adjoining property. The Court rejected the suggestion that the Twenty-first Amendment compelled a more deferential standard of review, holding instead that "[t]he State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 4027 n.5. And in *Craig v. Boren*, 429 U.S. at 209, the Court overturned an Oklahoma statute that established different drinking ages for males and females and declared that "the operation

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[50] *See also United States v. State Tax Commission*, 412 U.S. 363 (1973) (state cannot regulate delivery of alcoholic beverages to military bases in light of constitutional grant of exclusive jurisdiction to Congress).

[51] P. Brest, Processes of Constitutional Decision-making, Cases and Materials 258 (1978).

of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case."[52]

These decisions ~~demonstrate~~ that the Twenty-first Amendment does not ease the First Amendment standards otherwise applicable to Oklahoma's ban. The decisions in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), and *California v. LaRue*, 409 U.S. 109 (1972)—relied on by the court below, 699 F.2d at 498, Pet. App. A at 169-170—are not to the contrary. In those cases, the Court held that states could forbid sexual performances or topless dancing in establishments licensed to sell alcoholic beverages. Both decisions turned on "[t]he critical fact . . . that [the State] has not forbidden these performances across the board [but] has merely proscribed [them in] establishments that it licenses to sell liquor by the drink." *California v. LaRue*, 409 U.S. at 118.[53] The decisions thus merely permitted states to limit activities in places that serve alcoholic beverages "as part of [the states'] liquor license program[s]." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975). Oklahoma's advertising ban, in contrast, is not limited to activity within liquor-licensed establishments, nor is it imposed as a condition on the manner or circumstances in which liquor may be dispensed.[54]

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[52] *See also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79 (1972) (state liquor regulation cannot promote or enforce racial discrimination in violation of Equal Protection Clause).

[53] *See also New York State Liquor Authority v. Bellanca*, 452 U.S. at 716 ("As in *LaRue*, the statute's prohibition applies only to establishments which are licensed by the State to serve liquor").

[54] *Bellanca* and *LaRue* are also distinguishable from the present case in that both involved restrictions on conduct, rather than speech. *See California v. LaRue*, 409 U.S. at 118 (the prohibited performances "partake more of gross sexuality than of communication"); *Craig v. Boren*, 429 U.S. at 207 (distinguishing *LaRue*). As discussed above, the truthful advertising banned by Oklahoma is protected speech.

Similar considerations distinguish this case from *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), a summary dismissal of appeal which the Tenth Circuit viewed as "mandat[ing]" its decision here. 699 F.2d at 502, Pet. App. A at 24a. The regulation in *Queensgate* prohibited liquor license holders from advertising prices per drink or price advantages.[55] The regulation was unsuccessfully challenged in state court by a liquor licensee on First Amendment and other grounds; the appeal was dismissed by this Court for want of a substantial federal question. Like *Bellanca* and *LaRue*, *Queensgate* involved only a restriction on liquor licensees. Here, in contrast, Oklahoma seeks to enforce its ban against cable operators, who do not sell liquor and are not licensed to do so. Whatever special authority the State may have to prohibit advertising by liquor licensees is not applicable here.[56]

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[55] *See Queensgate Investment Co. v. Liquor Control Commission*, 433 N.E.2d 138, 139 n.1 (Ohio 1982), *app. dismissed*, 103 S. Ct. 31 (1982).

[56] The advertising regulations upheld in *Queensgate* are also distinguishable from the Oklahoma ban in that they were far more limited in scope, forbidding only certain persons from advertising certain types of information about alcoholic beverages and leaving open substantial avenues for other forms of advertising about the product. The Tenth Circuit itself recognized that Oklahoma's sweeping ban on the advertising of alcoholic beverages is "indeed broader than the regulation in *Queensgate*." 699 F.2d at 497, Pet. App. A at 15a. This Court has emphasized that to the extent that a summary disposition has any precedential value, it should be narrowly interpreted to extend only to "the precise issues presented and necessarily decided . . . . [and] should not be understood as breaking new ground." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

II. BY PREVENTING CABLE OPERATORS FROM TRANSMITTING ADVERTISER-SUPPORTED OUT-OF-STATE PROGRAMMING, THE STATE BAN RESTRICTS NONCOMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

As applied to Oklahoma cable television operators, the ban's impact goes well beyond the suppression of wine commercials themselves. Because of the nature of the cable industry and the federal regulatory system under which it operates, the prohibition of wine commercials would effectively prevent Oklahoma cable operators from disseminating any out-of-state programming—including news, documentaries, sports, entertainment, and various other services—that might contain wine commercials. Even if Oklahoma's ban on the advertising of alcoholic beverages were not unconstitutional as an infringement of protected commercial speech, the First Amendment cannot countenance the regulation's substantial interference with the dissemination of noncommercial speech.[57]

A. The Oklahoma Ban Effectively Prevents Cable Operators From Offering Advertiser-Supported Programming From Outside the State.

As discussed above, cable television operators are prevented by federal law from eliminating commercials from out-of-state television signals. The Federal Communications Commission specifically forbids cable operators from deleting commercials or making any other alterations in the television signals they disseminate, 47 C.F.R. § 76.55(b) (1982), and the Copyright Act of 1976 forbids cable operators from deleting or altering advertise-

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[57] The fact that this news and entertainment programming contains advertising does not render it "commercial speech" for purposes of First Amendment analysis. *See Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2880; *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964).

ments contained in television signals which they transmit pursuant to the "must carry" rules or under compulsory copyright licensing. 17 U.S.C. §§ 111(b)(3), 111(c)(3) (1982).[58]

Even if it were lawful, it would be technically impossible to eliminate the commercials completely and instantaneously. Operators have no way of knowing when wine commercials will appear—they receive no advance notice of wine commercials from the television stations whose signals they distribute, and the signals themselves include no visual or audio cues to forthcoming wine commercials. Pet. App. G. at 40a.[59] In these circumstances, as the district court found, even to attempt to comply with the advertising ban would impose an "enormous financial burden" on cable operators. Pet. App. D at 29a. Deletions of the wine commercials and substitution of other material would require expensive switching equipment and individual monitoring throughout the broadcast day of each signal on which a wine commercial might appear. Cable operators testified below, without contradiction, that such procedures would be extremely costly and impractical. J.A. 23-26, 29-30, 36-38.[60]

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[58] Congress established the compulsory licensing scheme because it determined that cable operators could not feasibly attempt to obtain individual copyright agreements from the copyright owner of each program carried on each signal. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

[59] It was this problem that led the Federal Communications Commission to reject a proposed rule requiring cable operators to delete commercials in certain circumstances; such a rule would be infeasible, the Commission found, because cable operators would be unable to secure the "close cooperation" of broadcasters necessary to enable the deletions to be made. *Cable Television Report and Order*, 36 F.C.C.2d 143, 165 (1972), *aff'd sub nom. ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

[60] The great cost of such measures is suggested in comments filed when the Federal Communications Commission was considering a proposal to require commercial substitution by cable operators. *Cable Television Report and Order*, 36 F.C.C.2d at 154-55. The National Association of Broadcasters, for example, projected equip-

In addition, although the Commission does not forbid cable operators from deleting commercials from satellite-carried programming services such as CNN and ESPN, operators could not make such deletions for the same technical and economic reasons as make it impossible for them to delete commercials from television station signals. Cable operators typically receive no notice from cable programming services regarding the placement of wine commercials and would be forced to employ costly equipment and staffing in order to attempt the deletions.[61]

Thus, the district court correctly found that "[t]here exists no feasible way for [petitioners] to block out the advertisements." Pet. App. G at 41a. If they are to obey state law, cable operators' only alternative is to refrain from transmitting any programming that might include wine commercials. The court of appeals did not disturb the district court's finding; indeed, the court noted that cable operators "especially are placed in a difficult position" by the State's advertising ban. 699 F.2d at 502, Pet. App. A at 23a. Nevertheless, the court analyzed the ban as if it affected only commercial advertisements and ignored the ban's substantial restriction of protected non-commercial speech.[62]

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ment costs of $140,000 for a system that would allow a cable operator to make deletions and substitutions in four broadcast signals. *Id.* at 155. The National Cable Television Association estimated that it would cost $27,000 for equipment and $90,000 in annual operating expenses for a cable operator to make deletions and substitutions in three signals. *Id.*

[61] Turner Brief at 7. Such deletion would also violate the terms of the operator's contract with the programmer and constitute infringement of the programmer's copyright. *Id.* at 6.

[62] This case is distinguishable on this basis from *Dunagin v. City of Oxford*, No. 80-3762 (5th Cir. Oct. 31, 1983) (en banc), in which a divided Fifth Circuit upheld the constitutionality of Mississippi's ban on alcoholic beverage advertising. In reaching its decision, the Fifth Circuit emphasized that Mississippi had not attempted to apply the ban to advertisements originating outside the state, including those contained in out-of-state signals transmitted by Mis-

B. In Restrciting Noncommercial Speech, the Oklahoma Ban Violates the First Amendment.

There can be no doubt that cable television—like newspapers and broadcast television and radio—is today "a significant medium for the communication of ideas . . . included within the free speech and free press guaranty of the First and Fourteenth Amendments." [63] While cable once served primarily as a means of bringing local television signals to low-lying neighborhoods and other areas with poor reception,[64] it now offers subscribers a wide range of programming from a variety of sources. Using microwave relays and communications satellites, cable operators can transmit to their subscribers signals from distant television stations, including "superstations" in Atlanta, Chicago and elsewhere, and national programming services such as CNN and ESPN. More than five thousand cable systems now serve over 30 million American households, transmitting an array of news, sports, and entertainment programming of diverse formats and content.[65] The rapid expansion of the industry over the last decade, coupled with the development of numerous programming services, has gone far toward fulfilling what this Court has recognized as cable's "'great potential . . . [for] augmenting the public's choice of programs and types of services.'" [66]

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sissippi cable systems. The Fifth Circuit observed that it was "exceedingly unlikely" that the state could ban wine commercials in cable signals originating in other states "in the face of the Commerce Clause, the Supremacy Clause and the First Amendment." Slip op. at 487 (West page proofs).

[63] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

[64] *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).

[65] BROADCASTING/CABLECASTING YEARBOOK 1983 at D3.

[66] *United States v. Midwest Video Corp.*, 406 U.S. 649, 654 (1972) (quoting *First Report and Order*, 20 F.C.C.2d 201, 202 (1969)). *See also Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1143 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982).

In determining what signals and services to include in their cable transmissions, cable operators exercise a substantial and important editorial function. Various courts have held that the First Amendment protects cable operators' editorial choice in programming.[67] While this Court has not expressly considered the First Amendment protection to be accorded cable operators, it recognized in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979), that cable operators have "a significant amount of editorial discretion regarding what their programming will include." The Court in that case invalidated, on statutory grounds, agency regulations that obliged cable operators to set aside certain channels for leased public access; these regulations, the Court held, "significantly compromise the editorial discretion actually exercised by cable operators" by preventing them from carrying programming they otherwise would disseminate and by "interfer[ing] with their determinations regarding the total service offering to be extended to subscribers." *Id.* at 707-08 n.17.

This Court has thus recognized that, like a newspaper, a cable operator "is more than a passive receptacle or conduit for news, comment and advertising," but rather engages in "[t]he choice of material . . . [that] constitute[s] the exercise of editorial control and judgment." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). By preventing cable operators from disseminating out-of-state broadcast signals and other advertiser-supported programming, Oklahoma has severely interfered with cable operators' selection of program-

[67] *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981), *cert. dismissed*, 102 S. Ct. 2287 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-56 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); *Cruz v. Ferre*, No. 83-330-CIV-WMH (S.D. Fla. Aug. 2, 1983); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

ming. Such a serious intrusion into the "crucial process" of editing, *id.*, violates the First Amendment.[68]

Moreover, by restricting cable operators' editorial choices, the Oklahoma ban restricts the flow of information and ideas to the State's citizens. It is the fundamental command of the First Amendment that "government itself shall not impede the free flow of ideas." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* In order to protect the national "free trade in ideas," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and to further the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the First Amendment requires that government shall not restrain speakers from disseminating protected ideas and information to willing listeners.[69]

Oklahoma's asserted interest in suppressing truthful advertising about a lawful, albeit controversial, product cannot justify this severe obstruction to the national commerce in ideas. This Court has overturned various state efforts to prevent the dissemination of protected speech thought to include some objectionable commercial element. In *Jamison v. Texas*, 318 U.S. 413 (1943), for example, the Court reversed the conviction of a Jehovah's Witness for distributing religious handbills that included

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[68] *See also Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 124-25 (1973); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 391 (1973).

[69] *See Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every ciitzen wherever he desires to receive it is . . . clearly vital to the preservation of a free society").

advertisements for religious books. The Court observed that states could then "prohibit the use of the streets for the distribution of purely commercial leaflets," *id.* at 417, but held that "[t]he mere presence of an advertisement" on a handbill promoting religious activity "may not subject the distribution of the handbill to prohibition." *Id.* at 416. *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

In *In re Primus*, 436 U.S. 412 (1978), the Court held that although states generally could forbid in-person solicitation by lawyers, such a ban could not be applied to solicitation by a lawyer for the American Civil Liberties Union. In such circumstances, the Court ruled, the impact of the solicitation ban went beyond commercial speech; the ban also threatened the ACLU's role "as a vehicle for effective political expression and association," *id.* at 431, and therefore implicated "'core First Amendment rights.'" *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)).

Similarly, in *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983), and *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), the Court struck down advertising restrictions principally because of their impact on commercial speech, but also because they effectively restrained the dissemination of nonpromotional information—in *Linmark*, information about housing trends within the town; in *Bolger*, information regarding methods of birth control and parental discretion. *See* 431 U.S. at 95-96; 103 S. Ct. at 2884-85. The suppression of this information, the Court declared in *Bolger*, "constitutes a 'basic' constitutional defect regardless of the strength of the government's interest." 103 S. Ct. at 2885.[70]

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[70] In *Valentine v. Chrestensen*, 316 U.S. 52 (1942), this Court held that a distributor of handbills composed primarily of commercial advertising could not escape a municipal ban on commercial leafletting by affixing a civic protest to the advertising "with the intent,

To be sure, the Oklahoma ban does not expressly restrict the dissemination of cable programming and is apparently not intended to achieve this end. That does not make it any less unconstitutional. The fact that a regulation on its face is directed solely at commercial speech does not mean that its broader effect on noncommercial speech may be ignored. As this Court recently affirmed in *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2880, every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." A government regulation is unconstitutional when so substantial an "effect on the exercise of First Amendment rights arises . . . as an unintended but inevitable result of the government's conduct." *Buckley v. Valeo*, 424 U.S. at 65.[71]

In *Bigelow v. Virginia*, this Court warned that enforcement of advertising bans against the press could severely restrain the press' ability to disseminate information and ideas:

> If application of this statute were upheld . . . Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper . . . . Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning.

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and for the purpose, of evading the prohibition." *Id.* at 55. There can, of course, be no suggestion in this case that the cable operators carry news and entertainment programming in addition to wine commercials in order to evade Oklahoma's ban on alcoholic beverage advertising.

[71] *See also Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures . . . cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment rights") (emphasis added); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

Id. at 828-29 (citations omitted). The regulations at issue here would produce precisely the results feared by this Court in *Bigelow*. The burden of the state regulation on an important medium of communication—cable television—is likely to be very great. The record documents that cable operators are heavily dependent on out-of-state programming. Virtually all out-of-state broadcast signals contain wine advertising, J.A. 21, 25, as do advertiser-supported cable programming services. This advertiser-supported programming is vital to attract subscribers and to supply revenues. J.A. 22, 37. By effectively banning the dissemination of out-of-state advertiser-supported programming, the state regulation would severely restrict the programming cable operators could offer their subscribers, cause them substantial financial losses, Pet. App. G at 42a, and even threaten their economic viability. J.A. 22.[72]

Although Oklahoma has not sought to prevent the sale within its borders of out-of-state publications containing liquor advertisements, the State has violated the First Amendment by effectively barring out-of-state cable programming just as surely as if it had forbidden distribution of the New York Times or Wall Street Journal. The presence of advertisements for alcoholic beverages in these media cannot justify the state in walling itself off from the national flow of ideas and information.

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[72] A State may not impose special burdens on the press that imperil or severely restrain its ability to function and to fulfill its constitutional role. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Cf. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 383, 390 (1973).

III. THE OKLAHOMA BAN IS PREEMPTED BY FEDERAL LAW AND AGENCY REGULATIONS.

The Oklahoma ban is also invalid under the Supremacy Clause because it conflicts with federal law and policy as reflected in the Communications Act, the Copyright Act, and Federal Communications Commission regulations and decisions.

A. The Federal Communications Commission's Mandatory Carriage Rules Require What Oklahoma Forbids.

The Oklahoma ban directly conflicts with rules of the Federal Communications Commission because it prevents cable systems operating near the Oklahoma border from transmitting to their subscribers commercial television signals that Commission rules require them to carry.

Cable operators in Oklahoma, as elsewhere, are required by Commission regulations to carry the signals of certain nearby television stations. 47 C.F.R. §§ 76.57-.61 (1982). This obligation applies to two types of commercial stations: those located within an operator's Commission-prescribed "zone" and those significantly viewed in the cable operator's community but located beyond the zone's perimeter. Commonly, cable systems located in one state are obligated to carry the signals of broadcast stations located in another state; in fact, the "must carry" rules result in the importation of out-of-state signals into approximately one-third of the land area of Oklahoma.[73] The Commission rules prescribe that these signals—like all television signals retransmitted by cable operators—must be "carried in full, without deletion or alteration of any portion." 47 C.F.R. § 76.55(b) (1982).[74] These

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[73] Memorandum of the Federal Communications Commission as Amicus Curiae on Petition for a Writ of Certiorari at 10.

[74] The provision forbidding alteration extends to commercial advertising and is an important aspect of the regulatory scheme. *See, e.g., Garland B. Pugh*, 68 F.C.C.2d 997, 999 (1978).

rules have been held to be within the Commission's jurisdiction.[75]

State law is preempted when it forbids what federal law requires, such that " 'compliance with both federal and state regulations is a physical impossibility.' "[76] Plainly, cable companies doing business in Oklahoma cannot obey the "must carry" rules—which require the carriage of out-of-state broadcast signals that periodically contain wine advertising—and at the same time obey Oklahoma's command that they not carry any wine advertising. An actual conflict exists between state and federal requirements, and the state law must yield. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962); *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

B. State Regulation of Cable Signals Has Been Expressly Preempted by the Federal Communications Commission.

The invalidation of the state law as to "must carry" signals, however, would not end the matter. Many of the program services carried by Oklahoma cable systems and affected by the Oklahoma ban[77] are not subject to the mandatory carriage rules because they are not local tele-

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[75] *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). A plurality of this Court endorsed the *Black Hills* holding in *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972), the Court having previously upheld the Commission's authority to regulate cable television in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Challenges to the constitutionality of the "must carry" rules under the First Amendment are currently pending before the Court of Appeals for the District of Columbia Circuit in *Turner Broadcasting System, Inc. v. FCC*, No. 83-2050 (D.C. Cir., filed Oct. 4, 1983), and *Quincy Cable TV, Inc. v. FCC*, No. 83-1283 (D.C. Cir., filed May 31, 1983).

[76] *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713, 1722 (1983) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

[77] As noted above, both distant broadcasters and cable satellite programmers carry advertisements, including wine commercials.

vision signals. The other programs that Oklahoma cable operators transmit are originated either by distant television stations, including "superstations" such as WTBS in Atlanta, or by cablecasters such as CNN and ESPN that provide the sort of "innovative nonbroadcast services" which the Commission predicted in 1972 would become cable's most important service. *Cable Television Report and Order*, 36 F.C.C.2d at 167. The Commission has expressly announced that states may not regulate either type of service.

Even during the period from 1966 to 1980 when the Commission restricted distant television signal carriage, it made clear: "[T]hat this Commission has pre-empted jurisdiction of any and all signal carriage regulation is unquestioned . . . . [Localities] do not have any jurisdiction or authority relating to signal carriage." [78] In 1980, the Commission eliminated all limitations on the importation of distant signals,[79] but it has continued to preempt state regulation.[80]

The Commission has never limited the importation of satellite cable services such as CNN and ESPN and, as with television signals, has consistently adhered to the view that state regulation of such services is precluded. The Commission first announced in 1969 that specialized

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[78] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 178 (1974). *See also Greater East Longmeadow Cablevision, Inc.*, 37 Rad. Reg. 2d (P & F) ¶ 1219, 1220-21 (1976) ("the field of signal carriage has been preempted by the Commission . . . ."); *Duplicative and Excessive Over-Regulation of Cable Television*, 54 F.C.C.2d 855, 863 (1975) ("The subject areas this agency has preempted include, of course, signal carriage . . . .").

[79] *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d 652 (1980), *aff'd, Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981).

[80] *See, e.g., Telecable Associates, Inc.*, 51 Rad. Reg. 2d (P & F) ¶¶ 147, 152 (1982).

cable services should not be regulated by either the Commission or the states. *First Report and Order*, 20 F.C.C. 2d 201, 205 (1969). In 1974 the Commission explicitly stated that it was "preempting the field" of nonbroadcast services, including made-for-cable satellite-carried signals.[81] The Commission noted that state regulation of specialized or auxiliary cable offerings[82] would conflict with its own determination to give cablecasters wide latitude in developing new programs and services:

> No one has any firm idea of how any of these services will develop or how much they will cost. Hence, for now we are preempting the field and have decided not to impose restrictive regulations [of our own].

Id. at 200. *See also First Report and Order*, 52 F.C.C.2d 1, 67, 68 (1975) (preempting local regulation "of rates [of subscription cablecasting] as well as program content"; "determinations as to when and how to regulate . . . must be made at the federal level"). The Commission's 1974 preemption order was sustained in *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979), in which the court held that the Commission had jurisdiction under the Communications Act to issue the order based on this Court's decision in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (plurality opinion).

The Commission recently confirmed that its preemption orders extend to programming services such as CNN and ESPN. *See Community Cable TV, Inc.*, FCC 83-525 (Nov. 15, 1983). Indeed, the Commission specifically referred to the state regulation at issue here and declared

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[81] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d at 200.

[82] The Commission did not define specialized or auxiliary services but stated that they would include, *inter alia*, specialized programming, advertising, and pay services. *Id.* at 199-200.

that such "[s]tate controls over advertising on cable channels distributed by space satellite . . . undermine the goals of preemption articulated by the Commission in this and earlier cases." Slip op. at 14 n.26. The Commission explained that such regulation "may undercut the economic base for [cable programming services] and render their operation on an interstate basis a practical impossibility." *Id.*

As this Court has held, when a federal intention to "occupy the field" is apparent, state regulation is prohibited. *See, e.g., Campbell v. Hussey*, 368 U.S. 297 (1961). Recently, in *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141 (1982), this Court confirmed that a federal agency has the authority, without express congressional endorsement, to preempt state action. This power exists although the federal regulation does not require, but merely permits, what the State seeks to forbid. *Id.* at 155. Like the federal agency in *Fidelity*, the Federal Communications Commission has "unambiguous[ly]" expressed its intention to occupy the field of signal carriage—covering both broadcast and satellite-carried programming—and to preempt contradictory state regulations. The Oklahoma law must therefore be invalidated.[83]

C. Apart From Express Preemption, the Oklahoma Ban Conflicts With Federal Policies.

Even apart from the Commission's "must carry" rules and preemption orders, it is clear that federal policies in this area cannot accommodate state interference of the sort undertaken by Oklahoma.

The signals which Oklahoma would oblige its cable operators to cease carrying are precisely the distant television signals and satellite-carried programming services

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[83] *See, e.g., Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. at 154; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

which the Commission has increasingly sought to encourage cable operators to deliver to their subscribers. Even in 1966, when the Commission limited the importation of distant signals, the Commission identified as one of its two goals in the cable area the delivery to the public of "the enriched programming selection which [cable] makes available."[84] Repeal in 1972 of the hearing requirement for carriage of distant signals[85] was intended to accelerate the availability of those signals throughout the country.[86]

The rescission in 1980 of all limitations on distant signal carriage was intended further to "broaden[] the range of options available to television viewers." 45 Fed. Reg. 60,299 (1980) (statement of Commission Chairman Ferris). The Commission declared that by "permitting the carriage of additional signals . . . [m]illions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities." *Cable Television Syndicated Program Exclusivity Rules*, 79 F.C.C.2d at 746 (1980). In upholding the Commission's action, the Second Circuit relied largely on the reasonableness of the Commission's finding that "consumers would be decidedly better off due to increased viewing options from the greater availability of expanded cable services." *Malrite T.V. of New York v. FCC*, 652 F.2d at 1146.

The Commission also strongly encourages the development of satellite-carried cable signals. As noted earlier, at no time has the Commission attempted to limit the

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[84] *Second Report and Order*, 2 F.C.C.2d 725, 745-46 (1966).

[85] Until 1972 cable operators could import distant signals into major television markets only after an evidentiary hearing and a finding that the signals' carriage would not unduly harm television broadcast service in the area. 47 C.F.R. § 74.1107 (1966).

[86] *Cable Television Report and Order*, 36 F.C.C.2d 143, 148, 165 (1972), *aff'd sub nom. ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

number of such signals a cable operator could import. As early as 1969 the Commission declared that "the public interest would be best served . . . by encouraging [cable] to experiment . . . in the expectation that the end result will be significant added diversity for the public."[87] By 1972, the Commission was of the belief that cable's greatest promise lay in services other than retransmission of broadcast signals.[88] In 1974, when it announced its preemption of local price regulation of specialized cable programming and its decision not to impose regulations of its own, the Commission again emphasized its desire to preclude States from hindering development of "the emerging cable industry and its prospects for introducing new and innovative communications services."[89] This view was recently confirmed in *Community Cable TV, Inc.*, FCC 83-525 (Nov. 15, 1983), in which the Commission observed that state regulation such as Oklahoma's would "impede new cable services and burden interstate communications." Slip op. at 14 n.26.

The Oklahoma ban conflicts also with a second, related federal policy, a policy derived from the First Amendment and embodied in Section 3(h) of the Communications Act: preservation of editoral discretion. In *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979), this Court held that the Commission was prevented by Congress' desire "to preserve editorial control of programming in the [cable] licensee" from compelling cable operators to set aside channels for community access programming. Thus, federal policy requires that cable operators enjoy "a significant amount of editorial discretion regarding what their programming will include."

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[87] *First Report and Order*, 20 F.C.C.2d at 205. Also in 1969 the Commission decided that cable programmers should be permitted "to derive revenues from commercials." *Id.* at 208.

[88] *Cable Television Report and Order*, 36 F.C.C.2d at 167.

[89] *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d at 199.

Id. at 707. *See also Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 110 (1973).[90]

The third relevant federal policy which is subverted by the Oklahoma ban is found in the Copyright Act of 1976, 17 U.S.C. §§ 101-18 (1982). The legislation constituted a major revision of federal copyright law, and it was the first time that Congress acted substantively in the cable field. In approaching the bill, Congress first determined to subject cable retransmissions of distant broadcast signals to some form of copyright liability. Having made this initial decision, Congress was concerned that the extension of traditional copyright liability to cable systems, which would require negotiations between the cable system and every copyright owner, would unduly restrict the availability of programming to this new and important medium.[91] The tenor of discussion was how Congress could grant television program suppliers some copyright protection while promoting the growth of the cable industry. To this end, Congress determined to create a compulsory licensing scheme to facilitate signal carriage. 17 U.S.C. § 111(c) (1982). As part of the compulsory licensing scheme, Congress provided that cable operators

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[90] The "must carry" rules discussed above have been justified by the Commission as designed to serve other purposes of the Communications Act by protecting local broadcast stations.

[91] The president of the National Community Television Association had argued that requiring cable operators to obtain program-by-program retransmission consent could very well force the cable industry "out of existence to the great injury [of] the public." *Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 86 (1966) ("*Hearings*"). The Commission, in 1972, reached the same conclusion. *Cable Television Report and Order*, 36 F.C.C.2d at 164 (program-by-program retransmission consent inconsistent with Commission's "basic objective . . . to get cable moving so that the public may receive its benefits"). *See also* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976) (alternative of requiring program-by-program negotiations rejected as "impractical and unduly burdensome [on cable operators]").

could obtain automatic licenses only if they carried the broadcast signals, including commercial advertisements, without "willfully alter[ing]" them. 17 U.S.C. § 111(c)(3) (1982).

The suggestion of compulsory licensing arose at the first hearing on these copyright proposals as an appropriate vehicle "to assure the public access to the variety of television programs [which cable makes available]." [92] Ultimately, in recommending the bill that became law, the House Judiciary Committee "wished [through the compulsory licensing scheme] to permit and encourage the broader dissemination of communications through cable." [93] Congress also made it clear that it favored importation of distant broadcast signals into all areas of the country, rejecting an earlier suggestion that cable operators be required to demonstrate that a given market was underserved before they could receive the automatic licenses.[94]

Oklahoma effectively prevents the importation of signals obtained pursuant to compulsory licensing and thereby prevents the "accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), because it discourages conduct that federal action seeks to encourage.

Although Oklahoma may not have intended its advertising ban to frustrate federal law and policy, the ban is nevertheless preempted as applied here because it actually conflicts with federal law and stands as an obstacle to the achievement of federal objectives. In *Perez v.*

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[92] *Hearings* at 81 (colloquy between Thomas C. Brennan, committee chief counsel, and Rosel H. Hyde, Federal Communications Commission chairman). *See also id.* at 1 (opening remarks by Sen. Burdick) ("public interest in providing for the widest possible dissemination of information").

[93] 122 CONG. REC. 32,009 (1976) (remarks of Cong. Danielson).

[94] *Hearings* at 86.

Campbell, 402 U.S. 637, 651-52 (1971), this Court ruled that:

> [w]e can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration.

Nor does it matter for preemption purposes that the State invokes the Twenty-first Amendment as authority for its ban. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court invalidated state liquor resale pricing regulations to the extent that they conflicted with the federal antitrust laws. The Court rejected the suggestion that the state law should prevail because of added authority conferred on the State by the Twenty-first Amendment: "[T]he Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine-pricing program." *Id.* at 114. Similarly, the Court has held that the Twenty-first Amendment bars the states from regulating alcoholic beverages on United States military bases or in national parks. *United States v. State Tax Commission*, 412 U.S. 363 (1973); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938). *See also Free v. Bland*, 369 U.S. 663, 666 (1962).

In summary, the Oklahoma ban is invalid because it conflicts with the Commission's mandatory carriage rules, the agency's explicit preemption determinations, and federal communications and copyright policy.

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

Of Counsel:

CLYDE A. MUCHMORE
CROWE & DUNLEVY
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102

TIMOTHY B. DYK *
JOHN W. ZUCKER
MARIAN E. LINDBERG
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Petitioner Capital Cities Cable, Inc.

* Counsel of Record

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APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED *

The Supremacy Clause to the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 76.57 of the rules of the Federal Communications Commission, 47 C.F.R. § 76.57, provides, in relevant part:

> A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:
>
> (a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:
>
> (1) Television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;
>
> * * * *
>
> (4) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

* Other pertinent constitutional provisions, statutes and regulations were included in Appendix H to the petition for certiorari.

Section 76.59 of the rules of the Federal Communications Commission, 47 C.F.R. § 76.59, provides, in relevant part:

> A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:
>
> (a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:
>
> (1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;
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> * * * *
>
> (3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community unit is located, in whole or in part;
>
> (4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt.—Plattsburgh, N.Y., television market);
>
> * * * *
>
> (6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.
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> * * * *
>
> (c) Where the community is located wholly or partially within one of the major television markets listed in § 76.51(a) and also wholly or partially within a smaller television market, the carriage provisions for the major markets shall apply.

Section 76.61 of the rules of the Federal Communications Commission, 47 C.F.R. § 76.61, provides, in relevant part:

Where a system serves a community that is located in whole or in part within a major television market, that community unit shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part: *Provided, however,* That where a community unit is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the community unit is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

* * * *

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market);

(5) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.